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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BOARD OF TRUSTEES OF THE
SOUTHERN NEVADA GLAZIERS AND
FABRICATORS PENSION TRUST
FUND,

Plaintiff,

vs.

J & M GLASS, LLC, an Arizona limited
liability company; WESTERN NATIONAL
MUTUAL INSURANCE COMPANY, a
Minnesota corporation; JOHN DOES I-XX,
inclusive; and ROE ENTITIES I-XX,
inclusive,

Defendants.

CASE NO.:

**COMPLAINT FOR BREACH OF
CONTRACT, VIOLATION OF
ERISA, DECLARATORY RELIEF
UNDER ERISA, AND DEMAND FOR
RELIEF ON BONDS**

Date: N/A
Time: N/A

The Plaintiff, the Board of Trustees of the Southern Nevada Glaziers and Fabricators Pension Trust Fund (“Plaintiff” or “Trust Fund”), acting by and through its attorneys, Christensen James & Martin, Chtd., hereby complains, asserts and alleges as follows:

JURISDICTION & VENUE

1. This Court has jurisdiction of this case pursuant to Section 502(e)(1) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), 29 U.S.C. § 1132(e)(1), which grants the United States District Courts exclusive jurisdiction over civil actions brought by a fiduciary pursuant to Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), to redress violations or enforce the terms of ERISA or an employee benefit plan

governed by ERISA. Such jurisdiction exists without respect to the amount in controversy or the citizenship of the parties, as provided in Section 502(f) of ERISA, 29 U.S.C. § 1132(f).

2. This Court has jurisdiction of this case pursuant to Section 301(a) of the Labor Management Relations Act of 1947, as amended (“LMRA”), 29 U.S.C. § 185(a), which grants the United States District Courts original jurisdiction over suits for violation of contracts between an employer and labor organization in an industry affecting commerce, without respect to the amount in controversy or the citizenship of the parties.

3. To the extent this Complaint sets forth any state law claims, this Court has supplemental jurisdiction over those claims pursuant to 28 U.S.C. § 1367(a).

4. Venue is proper in this Court pursuant to Section 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2), and Section 301(a) of the LMRA, 29 U.S.C. § 185(a), in that this is the Judicial District in which the Plaintiff is administered.

PARTIES

5. The Trust Fund is an express trust created pursuant to a written declaration of trust (“Trust Agreement”), consistent with § 302(c) of the LRMA [29 U.S.C. § 186(c)], existing “to implement a Section 401(k) retirement plan ... for the benefit of all [covered employees],” within the meaning of ERISA, 29 U.S.C. § 1002(2), (3), and (37).

6. The Trust Fund is administered in Clark County, Nevada.

7. The Board of Trustees and the individual Trustees of the Trust Fund are “named fiduciar[ies],” “plan administrator[s]” and “plan sponsor[s]” and each is an individual “fiduciary,” within the meaning of 29 U.S.C. §§ 1102(a), 1002(16), & (21), with respect to collection of contributions due to the Trust Fund and related matters.

8. J & M Glass, LLC (“J&M”) was and/or is an Arizona limited liability company operating as a glass and glazing contractor in Arizona under Arizona Contracting License No. 302375, a Specialty Dual CR-65 Glazing license.

1 commerce.

2 15. On or about August 2, 2019, J&M signed a Master Labor Agreement (“CBA”)
3 with Painters and Allied Trades District Council No. 36 on behalf of Glaziers, Architectural
4 Metal and Glass Workers Local Union No. 86 (“Union”), whereby J&M bound itself to the
5 terms of the CBA.

6 16. The Union is a labor organization within the meaning of Section 301 of the
7 LMRA [29 U.S.C. § 185(a)], and an employee organization within the meaning of Section
8 3(4) of ERISA [29 U.S.C. § 1002(4)].

9 17. The CBA establishes the terms and conditions of employment for all
10 employees of J&M who are or were performing work covered under its terms.

11 18. After the initial term, the CBA renews automatically from year to year unless
12 properly terminated.

13 19. The CBA has not expired, has not been terminated, and remains in full force
14 and effect.

15 20. At all times material herein, J&M was obligated by the CBA to submit
16 written reports to the Trust Fund on a timely basis showing the identities of employees
17 performing work covered by the CBA and the number of hours worked by or paid to these
18 employees.

19 21. Further, J&M promised that it would pay fringe benefit contributions to the
20 Trust Fund on a monthly basis and at specified rates for each hour worked by or paid to its
21 employees for covered labor performed by its employees.

22 22. Pursuant to the express terms of the CBA, reports and contributions to the
23 Trust Fund are due and payable on or before the tenth day of the month following the month
24 in which the work was performed, and deemed delinquent after the twentieth day of the
25 month. Starting with the February 2020 work month, the Board of Trustees of the Trust Fund
26 extended the delinquency deadline to the last day of the month following the month in which
27 the work was performed.

1 23. The CBA incorporates the Declarations of Trust and Trust Agreement of the
2 Trust Fund (“Trust Agreement”) and any amendments thereto and modifications thereof,
3 including the collection policies and procedures implemented by the Board of Trustees.

4 24. By executing the CBA and contributing to the Trust Fund, J&M also agreed to
5 be bound by the terms and provisions of the Trust Agreement utilized to create the Trust
6 Fund to which J&M was required to submit reports and contributions.

7 25. The Trust Fund is an intended beneficiary of the CBA.

8 26. The Trust Agreement governing the Trust Fund states that contributions that
9 are not received by the due date shall be assessed interest and liquidated damages calculated
10 through the date of payment.

11 27. The Board of Trustees has determined, through written policies, that interest
12 shall be assessed on delinquent contributions at the rate of seven percent (7%) per annum,
13 and that liquidated damages shall be assessed on unpaid contributions in the amount of \$20
14 or 1.5% per month up to 20% of the unpaid contributions, whichever is greater.

15 28. J&M failed to timely submit payment for contributions to the Trust Fund for
16 work performed during the December 2019 through March 2020 work months.

17 29. J&M has not submitted payment for contributions to the Trust Fund for work
18 performed during the July and August 2020 work months.

19 30. Interest and liquidated damages have been assessed on the late paid and
20 unpaid contributions in accordance with the Trust Fund’s policies.

21 31. J&M is currently delinquent to the Trust Fund for \$5,861.50 in unpaid
22 contributions, \$350.22 in interest, and \$1,164.83 in liquidated damages.

23 32. Several demands were made upon J&M to pay the amounts described herein.

24 33. J&M responded to at least one such demand and stated that payment would be
25 submitted.

26 34. As of the date of the filing of this Complaint, the amounts stated herein
27 remain unpaid.

1 35. Pursuant to the written terms of the Trust Agreement, Employer contributions
2 are considered fund assets from the date they are due, whether or not they are actually paid,
3 and must be held in trust by an employer until remitted to the Plaintiff. Employer
4 contributions are components of the employees' compensation and do not belong to the
5 employer. Employers have a fiduciary duty to ensure that employer contributions are
6 properly and timely delivered to the Plaintiff.

7 36. As an employer, J&M is obligated by the CBA, Trust Agreement, and ERISA
8 to maintain records with respect to each of its employees sufficient for the Plaintiff to
9 determine the benefits due, or which may become due, to such employees under the terms of
10 the employee benefit plans offered by the Plaintiff. *See* 29 U.S.C. § 1059(a)(1).

11 37. J&M is required to keep and maintain proper payroll and related records,
12 which are adequate and sufficient to readily identify all types and hours of work performed
13 by all of its employees, in order to determine, among other things, whether the employer has
14 properly reported and paid all contributions due to the Plaintiff.

15 38. The Trust Agreement and written policies adopted by the Plaintiff provide that
16 the Plaintiff may undertake reasonable inquiry, including audit, of J&M's records insofar as
17 may be necessary or appropriate to verify J&M's compliance with its obligations to the
18 Plaintiff under the CBA and Trust Agreement. The United States Supreme Court has upheld
19 a trust fund's right to audit the books of its contributing employers pursuant to the terms of
20 the trust funds' written trust agreements. *Central States, Southeast & Southwest Areas*
21 *Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 581 (1985). Further, the Ninth
22 Circuit Court of Appeals has determined that even if an employer did not sign the trust
23 agreement, it is still subject to the trust fund's audit rights. *Santa Monica Culinary Welfare*
24 *Fund v. Miramar Hotel Corp.*, 920 F.2d 1491, 1493–94 (9th Cir. 1990)

25 39. The Plaintiff has implemented a regular program whereby contributing
26 employers such as J&M are audited on a regular basis.

27 40. The CBA and Trust Agreement require J&M to make its records available for
28

1 such inspection.

2 41. In order to facilitate its audit policies and consistent with ERISA, the Plaintiff
3 has determined that every employer must maintain the following accurate and complete
4 records: state unemployment insurance reports; list of all employees, including job titles and
5 description of work performed; individual employee compensation records (individual
6 payroll earnings records); W-2 and W-3 forms for each employee; time cards or time sheets
7 for each employee; certified payroll reports; chart of accounts; general ledger, including
8 account transaction detail, cash disbursements and receipts transactions; trust fund remittance
9 reports; Federal Tax Forms 1099 and 1096; a list of jobs, including the job name, address or
10 location, project owner, general or higher-tiered contractors, and subcontractors; job costing
11 reports or other record of employees and hours of work performed by job; a list of
12 subcontractors, including the type of work performed; a list of related (affiliated) employers,
13 companies or entities, including an explanation of the relationship, if any; and any other
14 documents or records that will allow the Trust Fund to efficiently evaluate whether hours and
15 contributions were reported accurately.

16 42. If an audit reveals an underpayment, the CBA and Trust Agreement require
17 J&M to pay the underpaid contributions, plus accrued interest and liquidated damages.

18 43. The Trust Agreement and written policies of the Plaintiff requires J&M to
19 reimburse the Plaintiff for all attorneys' fees and court costs incurred by the Plaintiff,
20 whether or not legal proceedings were instituted and whether or not such examination
21 discloses that J&M has failed to make appropriate or timely contributions to the Plaintiff.

22 44. The Trust Agreement and written policies of the Plaintiff require J&M to
23 reimburse the Plaintiff for all audit fees incurred by the Plaintiff.

24 45. It has become necessary for the Trust Fund to retain legal counsel and initiate
25 this lawsuit to protect its legal rights under the CBA and ERISA.

26 46. J&M is obligated to pay the Trust Fund all unpaid fringe benefit contributions
27 plus accrued interest, liquidated damages, attorney's fees, costs of suit, and audit costs,
28

1 pursuant to 29 U.S.C. § 1132(g)(2).

2 47. The delinquencies asserted herein owed by J&M to the Trust Fund are
3 properly payable out of the proceeds of the Bond.

4 **FIRST CAUSE OF ACTION**

5 [Breach of Written Labor Agreement & Related Trust Agreement – J&M, DOES, ROES]

6 48. The Plaintiff herein restates and realleges the above allegations.

7 49. J&M, DOES and ROES breached the CBA and Trust Agreement and are
8 contractually delinquent by failing to timely and fully remit contributions when due to the
9 Trust Fund.

10 50. At all times material herein, J&M, DOES and ROES were and are the alter
11 egos and or guarantors of each other and are jointly and severally liable to the Plaintiff for
12 any and all obligations owed under the CBA.

13 51. The Plaintiff is entitled to recover as damages from the Defendants any and all
14 benefit contributions, interest and liquidated damages owed to the Plaintiff pursuant to the
15 CBA and Trust Agreement.

16 52. Defendants' actions have required the Plaintiff to retain legal counsel to
17 enforce its rights under the CBA and Trust Agreement. The Plaintiff is entitled to recover its
18 attorney's fees and costs from Defendants.

19 **SECOND CAUSE OF ACTION**

20 [Violation of ERISA – J&M, DOES and ROES]

21 53. The Plaintiff herein restates and realleges the above allegations.

22 54. By failing to remit contributions when due and pay all amounts owed to the
23 Plaintiff, J&M, DOES and ROES have violated Section 515 of ERISA [29 U.S.C. § 1145].

24 55. In accordance with the terms of the CBA and Trust Agreement, and pursuant
25 to Sections 502(g)(2) and 515 of ERISA [29 U.S.C. §§1132(g)(2) and 1145], the Plaintiff is
26 entitled to payment of all contributions determined to be due, as well as liquidated damages,
27 interest, attorneys' fees, and costs incurred in enforcing the terms of the Trust Agreement,
28 and such other legal and equitable relief as the Court deems appropriate.

THIRD CAUSE OF ACTION

[Declaratory Relief under ERISA – J&M, DOES and ROES]

56. The Plaintiff herein restates and realleges the above allegations.

57. By failing to remit contributions and related damages to the Trust Fund in accordance with the provisions of the CBA and the Trust Agreement, J&M, DOES and ROES have violated ERISA § 515, 29 U.S.C. § 1145.

58. Without access to J&M's records, Plaintiff is unable to determine whether J&M has accurately reported and paid contributions to the Trust Fund in accordance with the CBA and the Trust Agreement since reporting is based solely on an Employer's statement and the Plaintiff has no quick, economical, or efficient way to determine if the reported contributions are correct. Without access to J&M's records, Plaintiff will be unable to determine whether benefits have been properly paid which may subject the Plaintiff to penalties, suits and damages for the failure to perform its duties, the gross sum of which is incalculable, speculative, and may lead to irreparable damage.

59. In accordance with the terms of the CBA, Trust Agreement, written policies governing the Trust Fund, and pursuant to ERISA §§ 502(g)(2)(E) and 515, 29 U.S.C. §§ 1132(g)(2)(E) and 1145, ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), and binding Supreme Court precedent, Plaintiff is entitled to and hereby demands as appropriate equitable relief that the Court issue an order requiring J&M to produce its records for the purpose of the Trust Fund performing a payroll compliance audit to enable the Trust Fund to verify the amounts due to the Trust Fund and determine the amount of benefits to be provided to J&M's employees.

60. If the audit confirms that J&M owes money to the Plaintiff, the Plaintiffs hereby demands that the Court's order require J&M to promptly pay the deficiency.

61. The contract breaches and violations of ERISA identified above harm the Plaintiff and place at risk the Plaintiff's ability to provide required employee benefits to its beneficiaries.

1 62. The Plaintiff's remedies at law are not sufficient to adequately compensate the
2 Plaintiff or its beneficiaries from past harm caused by said violations, or to protect them from
3 the harm or threat of harm caused by similar future violations.

4 63. The Plaintiff is likely to prevail on the merits of its claims.

5 64. The Plaintiff is entitled to injunctive relief affirmatively compelling J&M to
6 make its records available to the Plaintiff for inspection and audit to verify J&M's
7 compliance with its obligations under the CBA and Trust Agreement.

8 **FOURTH CAUSE OF ACTION**
9 **[Demand for Relief on Bond – Western National]**

10 65. The Plaintiff herein restates and realleges the above allegations.

11 66. Western National issued the Bond as a condition for J&M to maintain its
12 Contracting License.

13 67. The Trust Fund and J&M's employees who provided labor as described herein
14 are intended third-party beneficiaries under the Bond.

15 68. The delinquencies asserted herein owed by J&M to the Trust Fund are
16 properly payable out of the proceeds of the Bond pursuant to the express terms of the Bond
17 Agreement and Arizona Revised Statutes 32-1152.

18 69. The proceeds of the Bond must be paid to the Trust Fund in full or partial
19 satisfaction, as the case may be, of J&M's obligations owed to its employees and the Trust
20 Fund or as damages caused by J&M's failure to properly act in accordance with the CBA
21 and/or the law, subject only to the penal limit on the Bond.

22 **PRAYER FOR RELIEF**

23 WHEREFORE, the Trust Fund prays for Judgment against Defendants, and each of
24 them, as follows:

25 1. For the Court's Order compelling J&M to deliver or make available to the
26 Plaintiff all information and documents necessary to permit the Plaintiff's auditors to perform
27 payroll compliance audits deemed necessary and proper by the Plaintiff;

2. For the Court's Order enjoining J&M from failing to fully cooperate with any audit deemed necessary and proper by the Plaintiff, and from failing to timely pay to the Plaintiff delinquent amounts discovered by the audit or as otherwise incurred in the normal course of business;

3. For the Court's Order awarding all contributions currently due or as determined to be due by audit, as well as liquidated damages, interest, attorneys' fees, costs incurred in enforcing the terms of the CBA and Trust Agreement, and such other legal and equitable relief as the Court deems appropriate.

4. For unpaid fringe benefit contributions in amounts to be proven at trial;

5. For damages for breach of contract in an amount to be proven at trial;

6. For liquidated damages in amounts to be proven at trial;

7. For accrued interest on all unpaid contributions and damages from their due dates until paid;

8. For audit costs in an amount to be proven at trial;

9. For reasonable attorney's fees;

10. For costs of suit incurred herein;

11. For such additional relief as may be provided for by 29 U.S.C. § 1132(g); and

12. For such additional relief as this Court deems just and proper.

DATED this 11th day of March, 2021.

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